United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2493

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

VS.

HAROLD SIMMONS

DEFENDANT-APPELLANT

BRIEF OF DEFENDANT - APPELLANT HAROLD SIMMONS

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STATEMENT OF THE CASE

Defendant, with two co-defendants, was charged with a bank robbery in a single indictment filed July 20, 1974 charging the usual three counts of bank robbery plus a fourth count alleging conspiracy to do the same.

Simmons stood mute at time of plea and a not guilty plea was entered on his behalf. The usual pre-trial motions were filed. Of significance to this appeal, Simmons, a Negro, filed a motion to stay the proceedings, to strike the jury panel and for a supplemental order concerning

the selection of prospective petit jurors. This motion, based upon an applicable record in another case on the same jury list, United States v. Louis Gonzalez, was denied.

On September 9, 1974 a jury trial commenced before Judge Newman. Subsequent to jury selection and prior to the taking of evidence, defendant moved to represent himself pro se and, with trial counsel in the role of adviser, defendant's motion was granted. The pro se representation by defendant until permission was withdrawn toward the close of the government's case in chief.

On October 23, 1974 the jury returned a verdict on Counts I, II and III of the indictment, the conspiracy count having been withdrawn from jury consideration. Defendant, on November 13, 1974, was sentenced to 25 years imprisonment.

STATUTES INVOLVED

28 U.S.C. §1861. Declaration of Policy

It is the policy of the United States that all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. §1862. Discrimination Prohibited.

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin or economic status.

28 U.S.C. §1863. Plan for Random Jury Selection.

(a) Each United States district court shall devise and place into written operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title...

(b) (1) ...

(b) (2) [Among other things, such plan shall ...] specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title...

18 U.S.C. §2113. Bank Robbery and Incidental Crimes.

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

...

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

...

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or devise, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

QUESTION PRESENTED

1. Did The District Court Err In Denying Defendant's Motion To Strike The Jury Panel And For A Supplemental Order On The Grounds That Existing Selection Procedures Result In A Substantial Disparity Between The Percentage Of Negroes In The Community And The Percentage On The Jury Source List, Requiring The Use Of Supplemental Source Lists.

THE FACTS

On August 28, 1974 defendant Simmons moved pursuant to 28 U.S.C. §1867 (a) (The Jury Selection And Service Act of 1968) to strike the jury panel and for a supplemental order concerning the selection of prospective jurors. Defendant's challenge was based on the claim that exclusive use of voter registration lists in selecting the pool of potential jurors denies his right under 28 U.S.C. §1861 and the Constitution to a jury drawn from a source representing a "fair cross section" of the community. Evidence from a similar in United States v. Gonzalez (District Court Crim. No. B-115) was accepted in this case (app. 10) and orally denied (app. 10) for the reasons set forth in the Gonzalez memorandum of decision (app. 12).

The trial was lengthy but a review of the transcript by counsel for defendant does not reveal any appealable issue other than the question presented.

ARGUMENT

I

EXISTING PROCEDURES FOR SELECTING THE JURY PANEL RESULT IN A SUBSTANTIAL DISPARITY BETWEEN THE PERCENTAGE OF NEGROES IN THE COMMUNITY AND THE PERCENTAGE ON THE JURY SOURCE LIST AND THEREFORE REQUIRES THE USE OF SUPPLEMENTAL SOURCE LISTS.

The sole question presented on this appeal was recently before this Court in United States v. Jenkins, 496 F.2d 57 (2nd Cir. 1974) petition for cert. filed April 29, 1974, docket no. 73-6639. The statistics in this case are more favorable to the defendant and also undercut the straight line reasoning in Jenkins.

The record indicates that the percentage of Negroes in the adult population of New Haven jury division is 5.45% whereas the jury pool from this petit jury was to be selected was only 2.26% of the pertinent Adult Negro polulation. In addition, the defendant established that if a venire of sixty were to be taken from the jury pool, the distribution of Negroes in such venire would be as follows (app. 14):

Number of Negroes	5.45% list	2.26% list
0	3.5%	25.4%
1	12.0%	35.2%
2	20.4%	24.0%
3	22.7%	10.7%
4	18.6%	3.5%
5	12.0%	.9%
6	6.4%	.2%
7 or more	4.4%	.4%

In United States v. Jenkins, supra, this Court adopted the standard that the substantiality of disparity, judged by the "local community" standard, should be determined by the difference that would result in the absolute racial composition of the venire rather than the ratio of the Negro adult population to the Negro adult percentage available for jury service. The Court went on to state that, under the statistics in that case the disparity would add only one (1) additional Negro to an average array of 50 to 60 venireman and that that was not a substantial disparity.

While that reasoning is persuasive if venireman were selected on a straight line basis, that same reasoning is suspect if we treat the selection on venireman on a random basis (which, in fact, is the way it is done). The above

statictics, showing the probable distribution on a random basis, is demonstrative of the fact that we do not see the one Negro in an average venire to which one more should be added for absolute parity, but that in over 25% of the venires there will be no Negroes using the current jury pool. And that in only 24% of the venires will we see the 2 adult Negroes which equate to the demographic population. Using the current jury pool we should expect to see 3 or more Negroes 15.7% whereas if the jury pool were representative of the demographic population, we would expect to see 3 or more Negroes 64.1% of the time. It is respectfully suggested that when 25% of the jury trials in a trial division do not have the potential to contain a single representative of a sizable and highly visible segment of the community then there is a substantial disparity within the meaning of the statute.

Counsel for defendant hesitates to reiterate the argument made before this Court in United States v. Jenkins, supra. Without abandoning the arguments advanced in that case, defendant will assume for the purposes of this argument that the test enunciated in Jenkins is correct, namely, that substantial disparity is determined by the difference that would result in the absolute racial composition of the venire as a result of underregistration of blacks as voters.

That test, assumes, of course, that there is such an animal as an average venire so that the absolute racial composition of the jury can be ascertained. But in reality, "random selection" (built into the jury selection system) says that there is no average venire and that the discrepancy of 2.26% Negroes in the jury pool vs 5.45% demographic becomes greatly magnified in the actual, not average, venires selected. Not only is the discrepancy magnified but whatever edge the defendant would have on a random basis of having more potential Negro jurors than the demographic ratio becomes virtually non-existent, under the current jury pool. While it is recognized that a defendant has no right to an absolute mirror of the community in the jury box he should at least have an opportunity to have the luck of the drawer work both ways. Under the present plan in the New Haven jury division, there is no such opportunity.

As in United States v. Jenkins, Judge Newman has once again issued the call for the Judges of the district to consider altering the jury selection plan. (app. 14) It is not enough. It is one thing to argue jury selection in the antiseptic environment of an appellate court and another thing to participate in an actual trial knowing full well that, in conjunction with an inadequate voir dire system totally unable to separate out prejudice, there is virtually no chance to have an adequate cross section of the community on

the petit jury. And not for just one venire but for the span of seven years as indicated in Jenkins.

As stated in appellant's brief in Jenkins:

> "Judge Newman suggested in his Memorandum of Decision that the facts raised during the defendant's motion to strike the jury panel might appropriately be considered by the judges of the District in altering the jury selection plan, but that their "apparent preference" for observing the operation of the present system "for a sufficient length of time to watch its results before considering improvements" did not argue for that system's statutory or constitutional infirmity. To this defendant would simply respond that time is no longer on the side of the Connecticut plan. That plan was adopted in June of 1968. Several venires have been called and dozens of juries have been empaneled since then. It is now over five (seven in the instant case) years later; the valid interest in observing the workings of a new system has long since dissapated. There has been ample opportunity for revision and perfection of the Plan. If the evidence in this case has demonstrated, as appellant believes it has, that the Plan in its present operation results in a substantial disparity from a fair cross-section requiring supplementary sources, the un-seized potential for amendment cannot save it. The Act provides and the Constitution requires that remedial steps must be taken."

CONCLUSION

Appellant respectfully asks this Court for the reasons stated herein to reverse the conviction on the indictment herein and to order the indictment dismissed. In the alternative, appellant respectfully required this Court to reverse the conviction on the indictment herein and to order a new trial.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief and Appendix of the defendant-appellant in the above matter was mailed postage pre-paid to Peter Clark, Esq., Asst. U.S. Attorney, Post Office Building, New Haven, Connecticut.

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